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PERFORMANCE CONTRACTING, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA for the use and  
benefit of WEBCOR CONSTRUCTION, INC.  
dba WEBCOR BUILDERS, and WEBCOR  
CONSTRUCTION, INC. dba WEBCOR  
BUILDERS,

Plaintiffs,

vs.

DICK/MORGANTI, a joint venture; DICK  
CORPORATION; THE MORGANTI GROUP;  
AMERICAN CASUALTY COMPANY OF  
READING, PENNSYLVANIA; NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA; and DOES 1-10, inclusive,

Defendants.

AMERICAN CASUALTY COMPANY OF  
READING, PA; NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH,  
PA,

Third-Party Plaintiffs,

Case No. 3:07-CV-02564-CRB

**PERFORMANCE CONTRACTING,  
INC.'S 1) STATUS UPDATE ON  
CLAIMS; AND 2) OPPOSITION TO  
MOTION TO STAY  
PROCEEDINGS**

DATE: October 19, 2007

TIME: 10:00 a.m.

JUDGE: Hon. Charles R. Breyer  
(Courtroom 8)

1 vs.

2 BOYETT CONSTRUCTION, INC., a California  
3 corporation; MARELICH MECHANICAL CO.,  
4 INC., a California corporation; PERFORMANCE  
5 CONTRACTING GROUP, INC. dba  
6 PERFORMANCE CONTRACTING, INC., a  
7 Delaware corporation; PERMASTEELISA  
8 GROUP USA HOLDINGS CORP., a Delaware  
9 corporation fdba PERMASTEELIS CLADDING  
10 TECHNOLOGIES L.P., a Delaware limited  
11 partnership, fdba PERMASTEELISA  
12 CLADDING TECHNOLOGIES, LTD.;  
13 ROSENDIN ELECTRIC, INC., a California  
14 corporation; THIRD PARTY DOE  
15 DEFENDANTS 1 THROUGH 20.

16  
17 Third Party Defendants.  
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1 **I. STATUS OF CLAIMS**

2 Performance Contracting, Inc. ("PCI") has made the following claims against  
3 Dick/Morganti ("D/M") and its Miller Act sureties: 1) \$3,005,018.00 for base contract work; 2)  
4 financing costs of \$253,817.34 resulting from D/M's failure to pay bi-weekly sums to PCI as  
5 required under the contract; 3) \$500,094.44 for change order work; and 4) \$3,853,402.05 for  
6 delay and impact damages resulting from D/M's mismanagement of the project.

7 PCI has never agreed that its claims fall under the Contract Disputes Act ("CDA"). To  
8 assist D/M in whatever negotiations it may have with the GSA, PCI presented a compendium of  
9 its claims to D/M on June 29, 2007. PCI has not heard from D/M since that submission, and  
10 PCI can only surmise that D/M has not submitted any claim to the "contract officer" pursuant to  
11 41 U.S.C. 605(c)(1).

12 Because of D/M's unilateral suspension of contract payments to PCI beginning in  
13 September, 2006, PCI filed an action in this Court on August 15, 2007 (Case No. C-07-4180)  
14 against D/M and its sureties for breach of contract, enforcement of Miller Act payment bond, and  
15 unjust enrichment. The total amount of the claim, exclusive of costs, attorneys' fees, penalties,  
16 and a portion of its interest, is \$7,612,331.83. PCI does not plan to raise any additional claims.  
17 PCI's claims are separate from Webcor's claims, and the adjudication of Webcor's claims will not  
18 directly impact those of PCI.

19 **II. OPPOSITION TO MOTION TO STAY PROCEEDINGS**

20 On or about April 22, 2003, PCI entered into a subcontract with D/M under which PCI  
21 agreed to furnish and install, among other things, FRC panels, lath & plaster, gypsum board, metal  
22 studs, and ceilings, for the new GSA Federal Building located at 7<sup>th</sup> and Mission Streets in San  
23 Francisco. See Declaration of James T. Strout in Support of Performance Contracting, Inc.'s  
24 Opposition to Motion to Stay Proceedings (the "Strout Declaration"), par. 2; see also Exhibit 1 to  
25 Strout Decl. PCI's claims arise from the work performed pursuant to this contract, and are  
26 attributable to 1) D/M's refusal to timely pay amounts due under the contract; and 2) the delay and

1 impact damages caused by D/M's mismanagement of the project. Strout Decl., par. 3.

2 D/M mismanaged the project so severely that the GSA issued its first "cure notice" to  
3 D/M on May 5, 2004. Strout Decl., par. 4; see Exhibit 2 to Strout Decl. There, the GSA  
4 threatened to discharge D/M as the general contractor for the entire project based upon 1)  
5 D/M's failure to properly manage the project; 2) D/M's lack of scheduling; 3) the disruptive  
6 turnover of D/M's personnel; and 4) D/M's lack of quality control. Exhibit 2 to Strout Decl.  
7 D/M responded to the cure notice in a letter dated June 25, 2004. Strout Decl., par. 5; see  
8 Exhibit 3 to Strout Decl. D/M acknowledged that it was responsible for the GSA's charges of  
9 mismanagement and promised that it would correct the problems. Exhibit 3 to Strout Decl.  
10 Despite the gravity of the GSA's charges, D/M failed to resolve these deficiencies. Some 14  
11 months later, on July 20, 2005, the GSA issued a *second* "cure notice" to D/M, re-charging D/M  
12 with the same or similar delinquencies. Strout Decl., par. 6; see Exhibit 4 to Strout Decl. These  
13 cure notices and the admissions in D/M's response show that most, if not all, of the  
14 responsibility for project mismanagement lies with D/M – not the GSA. Moreover, these  
15 mismanagement problems are the same problems that caused PCI's delay and impact damages.  
16 Strout Decl., par. 7.

17 For over 18 months, PCI did out of scope work and diligently presented D/M with change  
18 order requests for extra work as required by the PCI-D/M subcontract. Strout Decl., par. 8. PCI  
19 began to send the change order requests to D/M in or about April 2004. Strout Decl., par. 9.  
20 Over the next several months, personnel at D/M assured PCI that PCI's various change order  
21 requests had been submitted to the owner. Ibid. After many months of non-payment and lack of  
22 response by D/M, PCI insisted on a meeting with various D/M personnel in April 2006. Ibid.  
23 During this meeting, Curtis Lawyer, a project engineer for D/M on the project (who was  
24 responsible for processing PCI's change order requests), admitted that most of PCI's change  
25 order requests had not been submitted to the owner. Ibid. Thus, PCI learned through the April  
26

1 2006 meeting that D/M's previous statements about the change order requests was false – D/M  
2 had not submitted the vast majority of PCI's change order requests to the GSA! Strout Decl.,  
3 par. 10. PCI subsequently sent a letter to the GSA dated May 1, 2006, noting that many of these  
4 change orders requests had been outstanding for more than 18 months. Ibid; see Exhibit 5 to  
5 Strout Decl. D/M now attempts to represent to this Court that these change order requests are all  
6 pass-through claims. This claim is untrue. If D/M had truly believed that they were pass-  
7 through claims, it would surely have passed them on to GSA so that PCI would be paid directly  
8 by GSA, instead of having PCI look for payment from D/M years later. If these change order  
9 requests were in truth pass-through claims, D/M's clear financial interest would have caused  
10 D/M to process them as change orders and thus avoid the claims now before this Court.  
11

12 In fact, D/M has never been concerned with payments to its subcontractors. PCI submits  
13 that D/M made a conscious decision to fund this project largely on the backs of its  
14 subcontractors. In an internal email, D/M complained of the negative attitude of its unpaid  
15 subcontractors and stated that “[b]ecause we didn’t quite handle things correctly at the start of  
16 the project and because the subs are financing the project, their taste has really soured.” See  
17 Declaration of Matthew E. McCabe in Support of Performance Contracting, Inc.’s Opposition  
18 to Motion to Stay Proceedings (the “McCabe Declaration”). par. 3; see also Exhibit 2 to  
19 McCabe Decl..

20 The sad fact is that the subcontractors – not the general contractor – financed much of  
21 this project. This is because D/M formed a continuing policy not to pay the subcontractors on  
22 the project. PCI submits that this policy is now driving D/M's current efforts to stay this case.  
23 The provisions of this contract (see Paragraph Ninth) and FAR Regulations require  
24 subcontractors to perform all work on Federal projects as directed by the general contractor.  
25 Disputes are to be later resolved. D/M knew this. Yet, not only did D/M fail to pay PCI and  
26 other subcontractors for base contract work, it failed to even bother to process change order  
27

1 requests. To aggravate matters, D/M made false statements about the situation. D/M made a  
2 conscious effort to find ways to avoid paying the subcontractors while they were forced to  
3 continue on with the project.

4 When PCI complained about these problems, D/M became vindictive. In September  
5 2006, D/M unilaterally stopped all base contract payments to PCI. Strout Decl., par. 11.  
6 Nevertheless, PCI continued to perform its work and to supply materials to the project until  
7 February, 2007. Strout Decl., par. 11.<sup>1</sup> In addition to falsely stating that the change order  
8 requests had been submitted to the GSA, D/M attempted to deflect PCI's and other  
9 subcontractors' demands for payment by claiming that it has been "working" on a claim to the  
10 GSA for nearly two years. See McCabe Decl., par. 4 and Exhibit 4 to McCabe Decl.; see Strout  
11 Decl., par. 13. To PCI's knowledge, D/M has still submitted no claim to the GSA, and has  
12 given no copy to any subcontractors. Strout Decl., par. 13.

13 PCI submits that if this Court were to grant the instant motion to stay this case, the stay  
14 would cause: 1) needlessly delay in the adjudication of PCI's and other subcontractors' claims that  
15 are primarily, if not wholly, direct claims against D/M - not pass-through claims to the GSA; and 2)  
16 deprive PCI and other subcontractors of their right to an expeditious payment as required by the  
17 Miller Act.

18  
19 **A. PCI'S CLAIM FOR AMOUNTS DUE UNDER THE CONTRACT IS NOT A**  
**PASS-THROUGH CLAIM.**

20 PCI's claim for \$3,005,018.00 of base contract work is for a payment owed by D/M  
21 under the contract, pure and simple. It is not an obligation of the GSA. This contract obligation  
22 does not depend on any issues that will be addressed in D/M's claim against the GSA. PCI's  
23 additional claim for \$253,817.34 of financing costs is attributable to D/M's failure to pay PCI bi-  
24 weekly as required under D/M's contract. This contractual provision to pay every two weeks

25  
26 <sup>1</sup> This delay was approximately 14 months past the completion date that D/M had originally  
scheduled for PCI. Strout Decl., par. 11.



1 was a promise to pay by D/M – not by the GSA. This claim is also not dependent on any issues  
2 that will be addressed in D/M’s claim against the GSA. This \$3,258,835.34 is a pure contract  
3 claim against D/M and has nothing to do with any issue between D/M or the GSA. There are no  
4 grounds to stay such a claim.

5  
6 **B. PCI’S CHANGE ORDER CLAIM IS NOT A PASS-THROUGH CLAIM.**

7 For over 18 months, PCI did out of scope work and diligently presented D/M with change  
8 order requests for extra work as required by the PCI-D/M subcontract. PCI believes that D/M’s  
9 contract with the GSA was a “lump sum” contract. See Strout Decl., par. 14. Despite D/M’s  
10 representations that it had submitted these change order requests to the GSA, PCI discovered that  
11 these representations were false. No change order requests had been passed through to the GSA  
12 as required by PCI’s contract. PCI submits that D/M’s failure to pass through change order  
13 requests is an admission by D/M that its lump sum contract with the GSA did not allow D/M to  
14 pass-through PCI’s claims to the GSA. In this motion, D/M for the first time claims that all of  
15 PCI’s change order claims are pass-through claims. Not only is such a contention factually false,  
16 PCI submits that D/M is estopped from such an argument which would further delay payment of  
17 long overdue claims. Given D/M’s admissions, its deception, and the substantial delay that has  
18 already occurred, the Court should allow PCI’s claim for \$500,094.44 of change order work to  
19 be adjudicated in this Court.

20 **C. PCI’S CLAIM RELATING TO D/M’S MISMANAGEMENT IS NOT A**  
21 **PASS-THROUGH CLAIM.**

22 PCI’s claim for delay and impact damages is not a pass-through claim because D/M has  
23 admitted that it is responsible for the mismanagement complained of on this project. As the two  
24 separate GSA “cure notices” and D/M’s reply indicate, D/M is the party responsible for the  
25 problems giving rise to PCI’s delay and impact damages. In a federal construction project of  
26 this magnitude, such cure notices are extremely rare. Removal of a general contractor with the

1 required depth of knowledge and extensive accumulated factual background associated with a  
2 massive, multi-year project such as the 7<sup>th</sup> and Mission Streets GSA building is a very serious  
3 matter. Yet in this case, there were *two* such notices within a 14-month period. D/M's  
4 mismanagement was so apparent and so severe that the GSA thought it had no choice but to  
5 consider, on two separate occasions, the termination of its general contractor in the middle of a  
6 massive \$200,000,000.00 federal construction project. When it responded to the cure notices,  
7 D/M *admitted* that the GSA's mismanagement concerns were well-founded and promised to  
8 correct all of the problems. Surely, D/M did not consider then (and does not consider now) that  
9 the GSA was responsible for the mismanagement issues. Having admitted its mismanagement,  
10 D/M should not be now permitted to argue that PCI's \$3.8 million delay claim for  
11 mismanagement is somehow a claim to be made solely against the GSA. Such an argument  
12 serves but one purpose – to further delay an adjudication of PCI's claims for as long as possible  
13 so D/M can continue its barely concealed policy of avoiding payments to its subcontractors for  
14 its own mismanagement.

15 In conclusion, PCI submits that the great majority, if not all, of its impact claims are direct  
16 contract claims against the contractor. The contract between D/M and the GSA appears to be a  
17 “lump sum” contract, as to which D/M has heretofore failed or refused to pass-through  
18 ordinary, run-of-the-mill change order claims to the owner. Such direct claims are subject to  
19 resolution in the Federal District Court. It is well established that a contracting officer has no  
20 jurisdiction to resolve disputes between a general contractor and a subcontractor. See *NavCom*  
21 *Defense Electronics, Inc. v. Ball Corp.*, 92 F.3d 877, 880 (9<sup>th</sup> Cir. 1996); *U.S. West*  
22 *Communications Services v. United States*, 940 F.2d 622, 627 (Fed. Cir. 1991).

23 **D. D/M'S POLICY ARGUMENTS IGNORE THE PURPOSE OF THE**  
24 **MILLER ACT.**

25 D/M and its sureties imply that their motion is merely an attempt to uphold the policies of  
26 protecting administrative authority and promoting judicial efficiency. This claim is not true. In  
27



1 making this argument, D/M is, in fact, undermining the very protections afforded subcontractors  
2 under the Miller Act.

3 The primary purpose for enactment of the Miller Act was to provide subcontractors with  
4 an expedited procedure to obtain payment for goods and services provided on federal  
5 construction projects. In asking this Court to focus narrowly on the restrictive language in the  
6 subcontracts drafted by the contractor, and to ignore the contractor's failure to pay for base  
7 contract work, to process change orders, and to properly manage the project, D/M is effectively  
8 asking this Court to repudiate the basis of the Miller Act.

9 The predecessor of the Miller Act was the Heard Act. The reason for passage of the  
10 Heard Act was that many contractors constructing public buildings for the government were  
11 insolvent when entering into the contracts or at the completion of the work. Because  
12 mechanics' and materialmen's liens were not provided for on public buildings, subcontractors  
13 furnishing labor or material to the contractors were left without a remedy. See *United States v.*  
14 *Daniel, Urbahn, Seelye and Fuller*, 357 F.Supp. 853, 857 (N.D.Ill.1973); see also *United States*  
15 *for the Use of DDC Interiors, Inc. v. Dawson Constr. Co., Inc.*, 895 F.Supp. 270, 272 (Dist.  
16 Colo. 1995).

17 The Heard Act was repealed by the Miller Act because it did not provide subcontractors  
18 with a sufficiently expedited remedy. One of the resulting hardships was that subcontractors  
19 were often forced to accept compromises of their claims:

20 [I]t appears that claimants frequently find themselves under the  
21 necessity of choosing whether they will wait for years for their  
22 money or accept compromises which, if they do not involve greater  
23 loss, at least destroy the profitability of the contract. Those in  
24 financial stringency, of course, have no choice but the latter  
25 alternative.

26 See *United States v. Daniel, Urbahn, Seelye and Fuller, supra*, 357 F.Supp. at 857, citing  
27 H.R.Rpt. No. 1263, 74th Cong., 1st Sess. 2 (1935). Thus, the purpose of the Miller Act was to  
expedite payment to subcontractors and avoid forced and unfair compromises.

1 By this request to stay these proceedings, D/M and its sureties are attempting to return to  
2 the pre-Miller Act era and force the subcontractors before this Court to wait for an extended  
3 period to get paid. PCI submits that if D/M can force PCI and the other subcontractors to wait  
4 for payment of tens of millions of dollars of unpaid claims, while it litigates with the GSA, the  
5 subcontractors in this action will ultimately have to accept a compromise of their claims. The  
6 Court should deny the sureties' motion because granting the requested stay constitutes a  
7 repudiation of the purpose underlying the Miller Act.

8 **III. CONCLUSION**

9 For all the reasons cited above, PCI respectfully requests that the motion for a stay of  
10 these proceedings, especially as it relates to PCI's claims, be denied.

11  
12 Dated: September 21, 2007

OTIS CANLI & IRIKI, LLP

13  
14 By: 

15 J. Morrow Otis  
16 Attorneys for Third-Party Defendant  
17 PERFORMANCE CONTRACTING, INC.  
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**PROOF OF SERVICE**CASE NAME: *Webcor Construction, Inc., et al. v. Dick/Morganti, et al.*COURT INFORMATION: United States District Court, Northern District of California, San Francisco  
Division Case No. 3:07-CV-02564-CRB

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of 18 years, and am not a party to the within action. I am employed in the City and County of San Francisco, California, and my business address is 625 Market Street, 4<sup>th</sup> Floor, San Francisco, California 94105-3306. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. On the date listed below, following ordinary business practice, I served the following document(s):

- **PERFORMANCE CONTRACTING, INC.'S 1) STATUS UPDATE ON CLAIMS; AND 2) OPPOSITION TO MOTION TO STAY PROCEEDINGS;**
- **DECLARATION OF JAMES T. STROUT IN SUPPORT OF PERFORMANCE CONTRACTING, INC.'S OPPOSITION TO MOTION TO STAY PROCEEDINGS; and**
- **DECLARATION OF MATTHEW E. MCCABE IN SUPPORT OF PERFORMANCE CONTRACTING, INC.'S OPPOSITION TO MOTION TO STAY PROCEEDINGS**

on the party(ies) in this action, through his/her/their attorneys of record, by placing true and correct copies thereof in sealed envelope(s), addressed as shown on the attached Service List for service as designated below:

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(XX) BY ELECTRONIC FILING/SERVICE: I caused such document(s) to be Electronically Filed and Served through the PACER system for the above-entitled case. Electronic service has been accomplished by the service maintained by PACER.

( X ) (Federal) I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on September 21, 2007, at San Francisco, California

  
Michael McIntosh